88-220

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CHERYL ANN VIELLE,

Petitioner,

v.

WILLIAM JOSEPH BAISLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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August 8, 1988

QUESTION PRESENTED

Did the Colorado Court of Appeals err in affirming the Colorado district court's exercise of jurisdiction of a dispute involving the custody of two minor children who are enrolled members of the Blackfeet Tribe living on the Blackfeet Reservation in Montana?

LIST OF PARTIES

All parties to the proceeding in the Colorado Court of Appeals are listed in the caption. Petitioner, Cheryl Ann Vielle, was Appellant before the Colorado Court of Appeals. Respondent, William Joseph Baisley, was Appellee.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

Petitioner, Cheryl Ann Vielle, respectfully prays that this Court grant a writ of certiorari to review the judgment of the Colorado Court of Appeals entered on November 5, 1987. The Colorado Court of Appeals affirmed the Colorado district court's award of custody of Petitioner's two minor children to Respondent. The Colorado Court of

Appeals denied Petitioner's petition for rehearing on December 3, 1987. The Colorado Supreme Court denied Petitioner's petition for writ of certiorari on May 9, 1988.

OPINIONS BELOW

The July 31, 1986 Minute Order of the District Court, Boulder County, Colorado is reproduced and appended hereto as Appendix E.

The November 5, 1987 Opinion of the Colorado Court of Appeals is reproduced and appended hereto as Appendix G.

The December 3, 1987 Order of the Colorado Court of Appeals denying Petitioner's Petition for Rehearing is reproduced and appended hereto as Appendix H.

The May 9, 1988 Order of the Colorado Supreme Court denying

Petitioner's Petition for Writ of Certiorari is reproduced and appended hereto as Appendix I.

JURISDICTION

Petitioner seeks review of the judgment of the Colorado Court of Appeals, entered November 5, 1987, affirming the Colorado district court's minute order of July 31, 1986. That order denied Petitioner's motion to dismiss or, in the alternative, to hear testimony in the Blackfeet Tribal Court, and awarded permanent custody of Petitioner's children to Respondent. The Colorado Court of Appeals denied Petitioner's petition for rehearing on December 3, 1987. Petitioner's subsequent petition for writ of certiorari was denied by the Colorado Supreme Court on May 9, 1988. This

petition is filed within 90 days of the decision by the Colorado Supreme Court. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3) (1970).

STATUTES INVOLVED

The Indian Civil Rights Act, 25 U.S.C. § 1322(a):

> Assumption by State of Civil Jurisdiction
>
> (a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over

other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Indian Civil Rights Act, 25 U.S.C. § 1326:

Special Election.

State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Public Law 280, Act of August 15, 1953, Pub. L. No. 83-280, § 7 (67 Stat. 588, 590):

The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Blackfeet Tribal Law and Order Code, Chapter 2, § 1:

The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts.

Blackfeet Tribal Law and Order Code, Chapter 3, § 1:

All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage hereafter consummated. Commonlaw marriages and Indian custom marriages shall not be

recognized within the Blackfeet Reservation.

Blackfeet Tribal Law and Order Code, Chapter 3, § 2:

> All divorces must be consummated in accordance with the state Law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful divorces on the Blackfeet Reservation.

Montana Code Ann. § 2-1-301:

Assumption of criminal jurisdiction of Flathead Indian country. The State of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

Montana Code Ann. § 2-1-302:

Resolution of Indian tribes requesting state jurisdiction -- governor's proclamation -- consent of county commissioners. (1) Whenever the

governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.

(2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, and there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.

STATEMENT OF THE CASE

At issue in this case is the permanent custody of two enrolled members of the Blackfeet Tribe of Montana: Kristopher L. Baisley, age 5, and Willy B. Baisley, age 4.[1] These children were born of a common law marriage between their parents, Cheryl Ann Vielle, Petitioner, also an enrolled member of the Blackfeet Tribe, and William Joseph

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[1] Kristopher and Willy Baisley were enrolled in the Blackfeet Tribe on May 1, 1986. Blackfeet Tribal Business Council Resolution No. 179-86. The Tribal Council denied a subsequent request by Respondent to disenroll both children from membership in the Blackfeet Tribe. Blackfeet Tribal Business Council Resolution No. 285-87. See Appendix F.

Tribal determinations on the membership of individuals in the tribe are the exclusive province of the tribe, and are not subject to challenge in state court. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978).

Baisley, Respondent.[2]

Petitioner and Respondent lived together with the children until the time of their separation in June 1985. Respondent then moved to Boulder, Colorado with the children, pursuant to an oral understanding between himself and Petitioner that the children would be returned to her in Browning, Montana at the end of that summer.[3] However, Respondent refused to return the children to the Blackfeet Reservation at the end of August 1985.

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[2] Petitioner was enrolled in the Blackfeet Tribe in 1964 with Blackfeet Enrollee No. 201-12609. Respondent is a non-Indian.

[3] Although Browning was incorporated under the laws of Montana, it is located within the exterior boundaries of the Blackfeet Reservation.

Respondent repeatedly ignored Petitioner's pleas for the return of her two sons to Browning, Montana. Consequently, on January 7, 1986, she filed a Petition for Dissolution of Marriage and Motion for Temporary Custody Ex Parte in the Ninth Judicial District of Montana.* The Montana court issued an Order for Temporary Custody Ex Parte on that same day, and scheduled a show cause hearing for January 22, 1986. After being served with process, Respondent filed a petition for custody of the children in the Boulder County District Court of Colorado under the Uniform Child Custody Jurisdiction Act.

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* Petitioner selected this forum on the mistaken assumption that the Blackfeet Tribal Court would not have jurisdiction of the case.

The Colorado and Montana courts conferred by telephone on January 31, 1986, and determined that, because in their opinion Colorado was the "home state" of the two children, jurisdiction of the children's custody properly belonged with the Colorado court. This conference was not recorded, and neither party's counsel was present. The Colorado court issued a summary order asserting its jurisdiction of the custody dispute, but neither court ever issued an explanation of the factual or legal bases that led to their decision. The Montana court retained jurisdiction of the dissolution proceeding, and ordered the marriage of Petitioner and Respondent dissolved on March 5, 1986.

Following a temporary custody hearing on April 30, 1986, the Colorado court

awarded temporary custody of the children to both Petitioner and Respondent, each for a period of six weeks. Respondent was awarded custody from April 30, 1986 to June 11, 1986, and Petitioner was awarded custody from June 11, 1986 until July 28, 1986. A permanent custody hearing was scheduled for July 28, 1986. After Respondent's six week custody period ended, and pursuant to the Colorado court's order, he returned the children to Petitioner, on the Blackfeet Reservation, in June 1986.

On July 15, 1986, Petitioner filed for and received an emergency protective custody order from the Blackfeet Tribal Court, prohibiting the removal of the children from the Blackfeet Reservation until it was determined whether jurisdiction to hear the dispute over their

custody properly rested with the tribal court.

The Colorado court demonstrated a disturbing lack of respect for the tribal court's order when it conducted its permanent custody hearing on July 28, 1986. At the insistence of Petitioner's counsel, the Colorado court telephoned the tribal court, but when the tribal court's line was busy, the Colorado court determined that it could properly ignore the tribal court's emergency protective custody order.[5] The Colorado court denied Petitioner's motion to dismiss or, in the

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[5] The Colorado court held that because the jurisdictional dispute had been "litigated," the emergency protective custody order of the tribal court had "expired." See Appendix E. This despite the fact that three days earlier the tribal court had denied Respondent's Petition to Vacate the Emergency Protective Order. See Appendix D.

alternative, to hear testimony in the Blackfeet Tribal Court. The court then unilaterally affirmed its exercise of jurisdiction and awarded permanent custody of the children to Respondent.[6]

The Colorado Court of Appeals affirmed the decision of the lower court on November 5, 1987. Petitioner's petition for rehearing was denied on December 3, 1987. Petitioner's petition for writ of certiorari was denied by the Colorado Supreme Court on May 9, 1988.

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[6] Petitioner, a college student, was unable to attend the July 28, 1986 hearing due to her financial inability to travel from Montana to Colorado. There were no witnesses present at that hearing on her behalf. Refusing to postpone its decision until it could confer with the Blackfeet Tribal Court on the issue of jurisdiction, the Colorado court awarded custody of the children to Respondent solely on the basis of evidence presented by Respondent.

REASONS FOR GRANTING THE WRIT

Because the dispute in this case relates to the custody of two minor children who are enrolled members of the Blackfeet Tribe, and who were living on the Blackfeet Reservation at the time the jurisdictional dispute arose, exclusive jurisdiction to hear the case resides in the Blackfeet Tribal Court. The tribal court attempted to exercise that jurisdiction by issuing its emergency protective custody order of July 15, 1986, but that order was ignored by the Colorado district court during the permanent custody hearing it conducted on July 28, 1986. Instead of consulting with the tribal court on the jurisdictional dispute, the Colorado court summarily affirmed its own jurisdiction and awarded

custody of Kristopher and Willy Baisley to Respondent.

The Colorado Court of Appeals affirmed the district court's exercise of jurisdiction. The court of appeals did not base its decision on any findings of fact made by the district court on the issue of jurisdiction.[7] Instead, it assumed that the tribal court had jurisdiction of the case. It then proceeded to justify the state court's assertion of concurrent jurisdiction on the basis of

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[7] It should be noted that because Petitioner is challenging the jurisdiction of the Colorado district court to hear this case, neither the parties to this dispute nor this Court are bound by the factual findings made by the Colorado district court at the permanent custody hearing it conducted on July 28, 1986, as reflected in the opinion of the Colorado Court of Appeals. See Gainsville v. Brown-Crummer Investment Co., 277 U.S. 54 (1928) (jurisdictional challenge may be raised at any time).

legal conclusions regarding the federal Indian law applicable to this case.[8] It held that the Blackfeet Tribal Law and Order Code ceded concurrent jurisdiction "over divorce and custody matters arising incident thereto" to the state courts. Appendix G at G-15. The court of appeals found that the Indian Civil Rights Act, 25 U.S.C. § 1322 (1982), "cannot be interpreted to preempt state court jurisdiction in such matters." Id. at G-17. The court went on to note that it was unaware "of any other federal authority

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[8] The court of appeals' reliance on legal grounds, instead of factual grounds, to resolve this case is demonstrated by its reference to Petitioner as "an alleged enrolled member of the Blackfeet Indian Tribe." Appendix G at G-2. The court of appeals obviously felt that it could resolve the case without determining whether Petitioner and her two children were enrolled members of the Blackfeet Tribe.

governing child custody in a dissolution proceeding in which a tribal member was a party that would preempt state court jurisdiction." Id.

These legal conclusions are in direct conflict with the holdings of this Court and lower federal courts on tribal court jurisdiction and on tribal sovereignty in general. The legal errors contained in the opinion of the Colorado Court of Appeals warrant the reversal of that opinion by this Court, accompanied by a determination that jurisdiction to hear this case lies exclusively with the Blackfeet Tribal Court. The error of each of the Colorado Court of Appeals' conclusions is discussed below.

I. FEDERAL LAW PREEMPTS THE ASSERTION OF JURISDICTION OF THIS CASE BY A STATE COURT.

In affirming the jurisdiction of the Colorado district court to hear this case, the Colorado Court of Appeals relied on three provisions of the Blackfeet Tribal Law and Order Code.[9]

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[9] The three provisions are as follows:

Chapter 2, § 1 provides:

> The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts.

Chapter 3, § 1 provides:

> All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation.

Chapter 3, § 2 provides:

> All divorces must be

The court interpreted these three provisions to grant concurrent jurisdiction to Montana of divorces and "custody matters arising incident thereto" among the members of the Blackfeet Tribe. Id. at G-15. The court of appeals determined that the Montana court that handled the dissolution of Petitioner's marriage had the authority, under Montana state law, to defer jurisdiction of the custody dispute to Colorado, and, thus, held that the Blackfeet Code could be read to sanction the Colorado district court's assertion of jurisdiction of this case. This conclusion has two fundamental flaws.

(Footnote Continued)

consummated in accordance with the State Law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful divorces on the Blackfeet Reservation.

First, even if the language of the Code could be read to support the court of appeals' conclusion that the three provisions of the Code appear to constitute a cession of concurrent jurisdiction to Montana of divorces and "custody matters arising incident thereto" among the members of the Blackfeet Tribe, this Court, in a case involving the very same Blackfeet Code at issue in this case, has held that a mere tribal ordinance or tribal code provision is insufficient under applicable federal statutory enactments to vest jurisdiction of tribal affairs in a state court. Kennerly v. District Court of Montana, 400 U.S. 423 (1971). Second, the language of the Blackfeet Code cannot be read to support the court of appeals' conclusion.[10]

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[10] This argument will be discussed, infra, in Section II of this Petition.

A. The Blackfeet Code By Itself Cannot Grant Jurisdiction Of This Case to a State Court.

The Blackfeet Tribal Law and Order Code was adopted in 1967, one year before Congress enacted the Indian Civil Rights Act in 1968. At the time the Code was enacted, state assumption of jurisdiction of the affairs of Indian tribes and their members was governed by Public Law 280 (Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588). Section 7 of that statute provided:

> The consent of the United States is hereby given to any other state [not granted jurisdiction under this statute] to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

67 Stat. at 590 (emphasis added).[11]

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[11] Public Law 280 mandated that five states assume jurisdiction over the civil

In Kennerly v. District Court of Montana, 440 U.S. 423 (1971), this Court held that a unilateral cession of jurisdiction by a tribe to a state is insufficient to vest jurisdiction in the state under Public Law 280. In Kennerly, the petitioners, members of the Blackfeet Tribe residing on the Reservation, purchased food on credit from a grocery store located in Browning, Montana. A suit was brought in state court on the debt which arose from that transaction, and the petitioners moved to dismiss the

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(Footnote Continued)

and criminal affairs of Indian tribes. The five states were California, Minnesota, Nebraska, Oregon and Wisconsin. Section 7 applies to states, such as Montana, which were not granted such jurisdiction by the statute, but which might want to assume such jurisdiction at some point following the statute's enactment.

case on the ground that the state court lacked jurisdiction because (1) the petitioners were members of the Blackfeet Tribe, and (2) the transaction at issue took place on the Blackfeet Reservation. The state countered that § 1 of Chapter 2 of the Blackfeet Code had specifically granted it jurisdiction of civil cases involving a defendant member of the Blackfeet Tribe.[12]

This Court held that Montana's failure to assume civil jurisdiction of the Blackfeet Reservation by affirmative legislative action rendered ineffective the tribal code provision purporting to cede jurisdiction of civil cases

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[12] Chapter 2, § 1 of the Blackfeet Code is also one of the provisions of the Code relied upon by the Colorado Court of Appeals in this case. See note 9, supra.

involving a Blackfeet defendant to the state. Id. at 427. This Court noted that Montana had passed a statute assuming criminal jurisdiction of the Flathead Reservation,[13] and held that its failure to assume civil jurisdiction of the Blackfeet Reservation meant that it had no jurisdiction of that Reservation. The Blackfeet Tribe and Montana did not have the authority to work out an informal arrangement on jurisdiction among themselves. Any such arrangement had to comply with the mandates of federal law, as embodied in Public Law 280, in order to be effective.

One year after the adoption of the Blackfeet Code, Congress repealed

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[13] Id. at 425. The Montana statute referenced by the Court can be found at Mont. Code Ann. § 2-1-301 (1979).

Section 7 of Public Law 280, and enacted provisions of the Indian Civil Rights Act of 1968 (the "Act") in its place. See 25 U.S.C. §§ 1322, 1326. In order for a state to validly assume jurisdiction of an Indian reservation after 1968, both the state and the Indian Tribe must comply with the provisions of this Act.[14] Two mandates of the Act are particularly relevant.

First, the Indian Civil Rights Act requires a state "to assume" jurisdiction. 25 U.S.C. § 1322(a). This requires an affirmative act by the state. A state may not sit back passively and receive a grant of jurisdiction from a tribe.

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[14] Jurisdiction assumed lawfully prior to the enactment of the Act in 1968 need not comply with the Act in order to retain its validity.

Second, the Indian Civil Rights Act requires that a tribe assent to the assumption of jurisdiction by a state. This assent must take the form of a majority vote of the adult members of the tribe. 25 U.S.C. §§ 1322(a), 1326. Thus, subsequent to the enactment of the Indian Civil Rights Act in 1968, a referendum among the tribe's members is the exclusive method by which a tribe may manifest its assent to a state's affirmative assumption of jurisdiction of that tribe's reservation.

Montana's alleged assumption of jurisdiction of child custody disputes arising on the Blackfeet Reservation is invalid under both Public Law 280 and the Indian Civil Rights Act. Montana has never validly assumed jurisdiction of the Blackfeet Reservation.[15]

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[15] Montana did adopt a statute allowing Indian tribes to petition the governor

Montana's state legislature demonstrated its familiarity with the mandates of Public Law 280 when it passed a statute assuming jurisdiction of criminal affairs on the Flathead Reservation. The only logical inference is that the Montana legislature did not intend for the state, including the state courts, to have Public Law 280-authorized jurisdiction of the Blackfeet Reservation. In any event, Kennerly establishes conclusively that Montana did not validly assume jurisdiction of the Blackfeet Reservation under Public Law 280.

Because Montana had no jurisdiction of the Blackfeet Reservation when the

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(Footnote Continued)

for an assumption of jurisdiction by the state. See Mont. Code Ann. § 2-1-302 (1979).

Indian Civil Rights Act was enacted in 1968, its current alleged assumption of jurisdiction of child custody disputes arising on the Reservation, to be valid, must comply with the provisions of the Act. Under the Indian Civil Rights Act, Montana's alleged assumption of jurisdiction fails for two reasons: (1) Montana failed to enact a statute assuming such jurisdiction, and, therefore, has not satisfied the 25 U.S.C. § 1322(a) requirement that a state "assume" jurisdiction; and (2) the Blackfeet Tribe has never assented to the state's assumption of jurisdiction by a majority vote of its adult members, as required by 25 U.S.C. §§ 1322(a) and 1326.

Thus, the statement by the Colorado Court of Appeals that the Indian Civil Rights Act "cannot be interpreted to

preempt state court jurisdiction" of child custody disputes arising on the Blackfeet Reservation is mistaken. In the Act, Congress provided a clear and unequivocal road map for a state and an Indian tribe to follow to permit the state to assume jurisdiction of disputes arising on the tribe's reservation. Montana and the Blackfeet Tribe have never followed this road map. Thus, federal law has preempted the right of the Blackfeet Tribe to make, and the right of the State of Montana to accept, a unilateral grant of jurisdiction. The Colorado Court of Appeals' reliance on provisions of the 1967 Blackfeet Code to sustain the Colorado district court's exercise of jurisdiction of this case is unfounded, and in direct conflict with the holding of this Court in Kennerly.

B. The Court of Appeals Misunderstood the Application of Preemption Analysis in the Field of Indian Law.

The Colorado Court of Appeals demonstrated a fundamental misunderstanding of the operation of preemption analysis in the field of federal Indian law when it held that the district court's exercise of jurisdiction was not preempted by the provisions of the Indian Civil Rights Act, and when it stated that it was unaware of "any other federal authority governing child custody in a dissolution proceeding in which a tribal member was a party that would preempt state court jurisdiction." Appendix G at G-17. The court of appeals failed to heed the warning of this Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), that:

> [t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not states, and the differences in the form and nature of their sovereignty make it treacherous to impart to one ɔtions of pre-emption that are properly applied to the other.

Id. at 143.

The court of appeals' statements were based on the premise that standard state-federal preemption analysis was properly applied to this case. The standard analysis holds that states, in the exercise of their general police powers, may enforce their laws so long as they do not contravene federal statutes or policies adopted pursuant to one of the enumerated powers granted to the federal government in the United States

Constitution. After deciding, without explanation, that the district court's exercise of jurisdiction was not pre-empted by the Indian Civil Rights Act, the court of appeals proceeded on the theory that Congress' failure to explicitly prohibit state court jurisdiction of custody disputes involving tribal members signalled that the district court's exercise of jurisdiction was not preempted by federal law. This analysis is not the law.

Two recent cases decided by this Court make this very point. In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, this Court noted that its decisions have "rejected the proposition that pre-emption requires 'an express congressional statement to that effect.'"

476 U.S. 877, 885 (1986). Last year, in California v. Cabazon Band of Mission Indians, this Court stated that, absent express congressional consent, states may assert jurisdiction of tribes and their members only in "'exceptional circumstances.'" 107 S.Ct. 1083, 1091 (1987) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983)). In a footnote, the Court pointedly rejected the analytical approach adopted by the Colorado Court of Appeals: "the ... presumption ... that state laws apply on Indian reservations absent an express congressional statement to the contrary ... 'is simply not the law.'" Cabazon at 1092 n.18 (quoting Bracker, 448 U.S. at 151).

In most circumstances, the converse presumption applies: the failure of

Congress to affirmatively grant jurisdiction to a state connotes that state authority has been preempted. This is so because, under the Indian Commerce Clause of the United States Constitution, federal control over the affairs of Indians is plenary. Worcester v. Georgia, 31 U.S. (16 Pet.) 515 (1832). See U.S. Constitution, Art. I, § 8, cl. 3. The federal government traditionally has been very zealous in guarding this power, and this Court has been very reluctant to allow any intrusion into the unique relationship that exists between the United States and Indian tribes. See, e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973) ("by imposing [a personal income] tax ... the state has interfered with matters which the relevant treaty and statutes leave to the

exclusive province of the Federal Government and the Indians themselves.").

This presumption most definitely applies when a state attempts to infringe on the jurisdiction of a tribal court, as this Court has repeatedly demonstrated a particular concern for protecting the sovereign power of tribal courts to resolve disputes involving their members and arising on their reservations. See, e.g., Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Fisher v. District Court, 424 U.S. 382 (1976).

The present case does not require a detailed preemption analysis exploring the implications of the Colorado district court's exercise of jurisdiction on the sovereignty of the Blackfeet Tribe.

Congress has clearly and unequivocally outlined the steps whereby Montana may assume jurisdiction of child custody disputes arising on the Blackfeet Reservation. The most important step requires the Tribe's assent to Montana's assumption of jurisdiction by a majority vote of its adult members. Such assent would presumably remove any concerns about Montana's action infringing on the Tribe's sovereignty.

Contrary to the statement by the Colorado Court of Appeals, the district court's exercise of jurisdiction is preempted by federal law, even absent an explicit congressional prohibition of Montana's (and therefore Colorado's) exercise of jurisdiction in this case. The failure of Montana and the Blackfeet Tribe to follow the mandates of the

Indian Civil Rights Act precludes state exercise of jurisdiction. Absent compliance with the mandates of the Indian Civil Rights Act, federal preemption of jurisdiction remains intact.

II. THE COURT OF APPEALS MISINTERPRETED THE PROVISIONS OF THE BLACKFEET CODE AT ISSUE IN THIS CASE.

Even if the Blackfeet Tribal Law and Order Code could unilaterally grant the State of Montana concurrent jurisdiction of child custody disputes arising on the Blackfeet Reservation,[16] the Colorado Court of Appeals erred in holding that the Code accomplishes such a grant.

The court of appeals held that "[b]y the express terms of the Blackfeet Code, the state court was given jurisdiction

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[16] Section I of this Petition demonstrates that this is not possible.

over divorce and custody matters arising incident thereto." Appendix G at G-15. As discussed above, the "express terms" relied on by the court are contained in Chapter 2, § 1, and Chapter 3, §§ 1 and 2 of the Blackfeet Code. An examination of each of these provisions reveals that the Code in no way purports to make any grant of jurisdiction of this case to the state courts of Montana or any other state.

First, the court of appeals stated that Chapter 2, § 1 of the Code "gives a state court and the tribal court concurrent, nonexclusive jurisdiction of all suits concerning a member of the tribe." Id. at G-13. This is a misstatement of the language of this provision. The actual text of this provision reads as follows:

> The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits the defendant is a member of the Tribe which is brought before the Courts.[17]

This provision applies only to suits involving a defendant member of the Tribe, and has no application whatsoever to a case, such as this one, involving a Blackfeet plaintiff.[18]

Second, the court of appeals held that §§ 1 and 2 of Chapter 3 of the Code allow "a state court to exercise

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[17] Emphasis added.

[18] It should also be noted that Chapter 2 applies to "Civil Actions," whereas Chapter 3 governs "Domestic Relations". Under the rule that the specific governs the general in interpreting a statute, Chapter 2 has no applicability to a domestic dispute involving the custody of Blackfeet children. See MacEvoy v. United States, 322 U.S. 102, 107 (1944) (citing D. Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932)).

jurisdiction over marriage and divorce and provides that marriage and divorce shall be governed by state law."[19] Id. This represents another misstatement of the language of the Code. Section 1 (marriage) and § 2 (divorce) provide that state law governs marriage and divorce of tribal members; however, only § 1, relating to marriage, provides that members of the tribe are subject to state jurisdiction. The provision of Chapter 3, § 2, relating to divorce, makes no reference to state jurisdiction.

Further, none of the provisions cited by the court of appeals mentions child custody proceedings. The court of appeals glossed over the Code's silence by stating that "[t]hese provisions have

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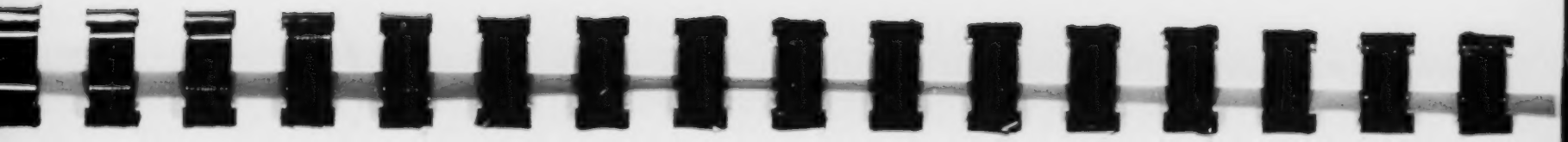
[19] Emphasis added.



been interpreted to allow a state court to make determinations of issues that are incident to divorce such as child custody." Id. In making this assertion, the court of appeals relied on a 1974 Ninth Circuit opinion, United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974). While Cobell does stand for the proposition for which it is cited by the court of appeals, it is of limited precedential value.

First, the Ninth Circuit in Cobell failed to consider, or even cite, this Court's opinion in Kennerly, supra. Thus, the Ninth Circuit conducted its entire analysis of the jurisdictional provisions of the Blackfeet Code without ever considering the possibility that those provisions were irrelevant to a determination of a state court's subject matter jurisdiction of a case.

Second, the Ninth Circuit either failed to notice, or decided to ignore, the fact that the Blackfeet Code's provision on divorce does not grant jurisdiction of Blackfeet divorces to state courts, but instead mandates that state law governs the dissolution of Blackfeet marriages.[20] Thus, the Cobell court made the same mistake as the Colorado Court of Appeals. It conducted a detailed analysis of whether jurisdiction of a child custody dispute attaches to jurisdiction of a divorce without noting that the Blackfeet Code does not grant jurisdiction of Blackfeet divorces to the state.

Finally, even if the Code had granted jurisdiction of Blackfeet

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[20] "Chapter 3 of the [Blackfeet Code] explicitly disclaims jurisdiction over ... divorce ...." 503 F.2d at 795.

divorces to the state, nowhere does it mention jurisdiction of child custody disputes. Nevertheless, the Ninth Circuit "interpret[ed] th[e] relinquishment of jurisdiction [of divorce] to encompass a surrender of jurisdiction over custody determinations incident to divorce as well." Id. This construction of the Code's silence on the issue of child custody suits rested on nothing more than the Cobell court's intuition, but this did not prevent the Colorado Court of Appeals from adopting the Ninth Circuit's reasoning without question.

The Cobell court's reasoning is undercut by subsequent holdings of this Court and the Ninth Circuit. Cobell is inconsistent with this Court's opinion in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), which holds that the

relinquishment of sovereign authority by a tribe is not to be presumed lightly. "Without regard to its source, sovereign power, even when unexercised, is an enduring presence that will remain intact unless surrendered in unmistakable terms." 455 U.S. at 148.[21] Merrion addressed the issue of whether the Jicarilla Apache Tribe could tax the production of oil and gas by non-Indian companies on tribal lands. The tribal constitution did not specifically authorize this type of taxation. Nevertheless, this Court held that "[b]ecause the tribe retain[ed] all inherent attributes of sovereignty that had not been divested by the federal government, the proper inference from [the tribal constitution's]

---

[21] Emphasis added.

silence on this point was that the sovereign power to tax remain[ed] intact." Id. at 148 n.14. Thus, any ambiguity created by the silence of the Blackfeet Code on the issue of jurisdiction of child custody disputes must be resolved in favor of the retention of jurisdiction by the Blackfeet Tribe.

Since Cobell, the Ninth Circuit itself has expressed the opinion that ambiguities in tribal codes or ordinances must be resolved by tribal courts. In R. J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983), a non-Indian contractor brought suit in federal district court against a tribal housing authority over a contract dispute. The contract had been executed and performed on the reservation. The tribal ordinance governing the tribal court's

jurisdiction to hear civil disputes was somewhat ambiguous on whether the court had jurisdiction to hear the case.[22] Instead of interpreting the tribal code on its own, the Ninth Circuit remanded the case to tribal court for a determination of the jurisdictional question.[23]

This holding has been confirmed by recent decisions of this Court. See Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985). The Colorado Court of Appeals failed to consider these post-Cobell cases on the interpretation of tribal codes, and

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[22] The exact issue involved whether the housing authority would qualify as a "person" as that term was used in the tribal code.

[23] "Interpretation of a tribal ordinance is one of the duties of a tribal court." Id. at 983.

interpreted § 2 of Chapter 3 of the Blackfeet Code on its own.

Merrion, LaPlante, National Farmers Union and R. J. Williams demonstrate that the court of appeals' reliance on Cobell was unfounded. It is also worth noting that the court of appeals made much of the integral relationship it saw between divorce proceedings and child custody proceedings, when in fact the Montana state court had retained jurisdiction of the dissolution of Petitioner's marriage even as that court proceeded to transfer jurisdiction of the custody dispute to Colorado. The Montana court obviously did not attach the same degree of interconnectedness to divorce and child custody that the Colorado Court of Appeals did in its opinion.

Thus, when the provisions of the Blackfeet Code are considered on their face, the opinion of the Colorado Court of Appeals is not in accord with the clear language of the Code, the Ninth Circuit's decision in R. J. Williams, and most importantly, this Court's holdings in Merrion, LaPlante, and National Farmers Union.

CONCLUSION

The opinion of the Colorado Court of Appeals is in direct conflict with numerous opinions of this Court on the proper exercise of state court jurisdiction of the affairs of Indian tribes and their members. For that reason, a Writ of Certiorari should issue to review the judgment of the Colorado Court of Appeals in this case.

Respectfully submitted,

M. JULIA HOOK
(Counsel of Record)
SUSAN N. HARRIS DIXON

HOLLAND & HART
555 Seventeenth Street
Suite 2900
Denver, Colorado 80202
(303) 295-8000

Counsel for Petitioner
Cheryl Ann Vielle

APPENDICES

Appendix A

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 86DR117 Division 2

MINUTE ORDER

In re the Marriage of:

WILLIAM JOSEPH BAISLEY, Petitioner,

and

CHERYL ANN VIELLE, Respondent.

DISTRICT COURT OF GLACIER COUNTY, STATE OF MONTANA
Case No. DR86-004
CHERYL ANN VIELLE,
Petitioner,

and

WILLIAM JOSEPH BAISLEY,
Respondent.

On February 10, 1986, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES:

Pursuant to C.R.S. 14-13-107, Judge R.D. McPhillips of the District Court of the Ninth Judicial District of the State of Montana has consulted with this Judge. We have concluded that there is no basis for Montana exercising jurisdiction in this matter. Therefore, although a petition relating to the subject children was filed in Montana prior to the action being filed in Colorado, Colorado is the appropriate Court to exercise jurisdiction pursuant to C.R.S. 14-13-104(1)(a) and (1)(b).

s/Murray Richtel
MURRAY RICHTEL, DISTRICT JUDGE

cc: Nancy Terrill (R. Box)
Judge R.D. McPhillips (Mail)

Appendix B

IN THE DISTRICT COURT OF THE
NINTH JUDICIAL DISTRICT OF

THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF GLACIER

IN RE THE MARRIAGE OF:	)	NO. DR 86-004
	)	
CHERYL ANN VIELLE,	)	
	)	
Petitioner,	)	FINDINGS OF
	)	FACT,
and	)	CONCLUSIONS
	)	OF LAW, AND
WILLIAM JOSEPH BAISLEY	)	DECREE OF
	)	DISSOLUTION
	)	OF MARRIAGE
	)	
Respondent.	)	

THIS CAUSE came on regularly for hearing in Open Court this 5th day of March, 1986. Petitioner, Cheryl Vielle, appeared with counsel, Kathleen E. Marx of Montana Legal Services. The Respondent has entered an appearance as to the custody of the minor children, but he has failed to enter an appearance as to the

dissolution of the parties' marriage, and Respondent's Default has been entered. Based on the evidence presented, the Court makes the following:

FINDINGS OF FACT

1. The parties entered into a common-law marriage in September, 1982, at Bozeman, Montana.

2. Petitioner was a domiciled resident of the State of Montana for ninety days preceding the commencement of this action, and the domicile has been maintained.

3. The marriage is irretrievably broken in that there is serious marital discord which adversely affects the attitude of the parties towards the marriage, and there is no reasonable prospect of reconciliation; and the parties have lived separate and apart for a period of

more than 180 days prior to the filing of this petition.

4. There are two minor children born of the parties' marriage: Kristopher Landon, born April 15, 1983; and Willy Brett, born May 24, 1984. Issues of custody, visitation and child support as to the minor children will not be adjudicated at this hearing.

5. The parties have accumulated property during the marriage including a 1978 Chevrolet Silverado pickup truck, Vehicle No. CKR148F347130 [initialed "R.D.M."], 1978 SR 500 Honda, 1978 VW Rabbit, children's car seats, household appliances and furniture, in which Petitioner requests the Court to divide equitably between them.

6. The parties have incurred debts during the marriage, and Respondent is

capable of paying them, and include, but are not limited to:

First Security Bank	$2500.00
Bozeman TVs Appliances	165.00
Kirby Company	750.00
Encyclopedia Book Co.	350.00-500.00

From the foregoing Facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this cause.

2. Petitioner is entitled to have the marriage dissolved.

3. Petitioner's request that she be awarded the 1978 Chevrolet Silverado pickup truck, the children's car seats and a Pendleton blanket, acquired during the marriage, is reasonable and should be granted.

4. Respondent should resume full responsibility for the payment of the debts incurred during the marriage.

DECREE OF DISSOLUTION OF MARRIAGE

1. The marriage of the parties is dissolved as of the date of this Decree.

2. The Conclusions of Law contained in Paragraphs 5 and 6 above, concerning the division of marital property and debts are incorporated herein in their entirety, and made a part of this Decree.

LET JUDGMENT ENTER ACCORDINGLY.

DATED this 5th day of March, 1986.

s/R.D. McPhillips
R.D. McPHILLIPS
District Court Judge

Appendix C

IN THE BLACKFEET TRIBAL COURT

FOR THE BLACKFEET INDIAN RESERVATION

IN THE MATTER OF:	)	No. J-41
	)	
KRISTOPHER LANDON BAISLEY, D.O.B. 4-15-83,	)	
	)	
WILLY BRETT BAISLEY, D.O.B. 5-24-84,	)	EMERGENCY PROTECTIVE ORDER
Minor Children,	)	
	)	
CHERYL VIELLE,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
WILLIAM BAISLEY,	)	
	)	
Respondent.	)	
	)	

THIS MATTER, having come before this Court, and good cause having been shown;

IT IS HEREBY ORDERED:

1. That it is in the above-named minor children's best interests that the

Petitioner is granted custody of the minor children pending litigation of the jurisdictional issue of which forum is more appropriate to determine the custody placement of enrolled members of the Blackfeet Indian Tribe who are residing on the Blackfeet Indian Reservation;

2. That the two above-named minor children are not allowed to leave the exterior boundaries of the Blackfeet Indian Reservation pending litigation of this jurisdictional issue.

DATED this 15 day of July, 1986.

s/Margie Merchant
BLACKFEET TRIBAL COURT JUDGE

Appendix D

IN THE BLACKFEET TRIBAL COURT

FOR THE BLACKFEET INDIAN RESERVATION

IN THE MATTER OF:	)	No. J-41
	)	
KRISTOPHER LANDON BAISLEY, D.O.B. 4-15-83,	)	
	)	
WILLY BRETT BAISLEY, D.O.B. 5-24-84,	)	
	)	ORDER
Minor Children,	)	
	)	
CHERYL VIELLE,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
WILLIAM BAISLEY,	)	
	)	
Respondent.	)	
	)	

THIS MATTER having come before the Court on Respondent's Petition to Vacate Emergency Protective Order, and having considered the Petitioner's Motion and Brief to Dismiss Respondent's Petition, and having reviewed the files and records and otherwise being advised,

IT IS HEREBY ORDERED:

That the Respondent's Petition to Vacate the Emergency Protective Order is denied;

And further, that the Emergency Protective Order issued on July 15, 1986 will remain in effect pending resolution of all jurisdictional issues concerning the custody of the two above-named minor children.

Dated this 25 day of July, 1986.

s/Margie Merchant
MARGIE MERCHANT
BLACKFEET TRIBAL JUDGE

Appendix E

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 86DR117, Division 2

MINUTE ORDER

WILLIAM JOSEPH BAISLEY, Petitioner,

and

CHERYL ANN VIELLE, Respondent,

and Concerning the Custody of:

WILLY BRETT BAISLEY and
KRISTOPHER LANDON BAISLEY.

On July 31, 1986, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES:

Nancy Terrill for the Petitioner.
Andrew Littman for the Respondent.

This matter came on for trial on July 28, 1986 and the following actions were taken by the Court:

1. The Respondent's Motion To Dismiss, Or, In The Alternative, To Hear Testimony In The Blackfeet Tribal Court was denied.

2. The Respondent's Motion To Continue was denied.

3. Permanent custody of the parties' minor children, Kristopher Landon Baisley and Willy Brett Baisley, was awarded to the Petitioner. No visitation schedule was fixed. The Respondent will be afforded visitation only after she has appeared in the Court for purposes of advising the Court regarding her views on visitation.

4. Respondent was ordered to return to the State of Colorado with the parties' minor children no later than noon on July 31, 1986. Because the jurisdictional issue has been litigated, the Emergency Protective Order of the Blackfeet Tribal Court of July 15, 1986 has expired.

s/Murray Richtel
MURRAY RICHTEL, DISTRICT JUDGE

cc: Nancy Terrill (R. Box)
Andrew Littman (R. Box)

Appendix F

BLACKFEET NATION
P.O. Box 850
Browning, Montana 59417
(406) 338-7179

R_E_S_O_L_U_T_I_O_N

NUMBER: 285-87

WHEREAS: The Blackfeet Tribal Business Council is the duly constituted governing body within the exterior boundaries of the Blackfeet Indian Nation, and

WHEREAS: The Blackfeet Tribal Business Council has been organized to represent, develop, protect and advance the views, interests, education and resources of the Blackfeet Indian Nation, and

WHEREAS: The Enrollment Department of the Blackfeet Tribe has received information and a Protest of Inclusion from Nancy Terrill, Attorney at Law, Boulder, Colorado for William Joseph Baisley, Non-Member stating that his two (2) sons namely, Kristopher Landon Baisley, Blackfeet Enrollee No. 201-U18735 and Willy Brett Baisley, Blackfeet Enrollee No. 201-U18736 have been unlawfully enrolled in the Blackfeet Tribe and thereby requests that said

children be removed from the rolls of the Blackfeet Tribe, and

WHEREAS: The Blackfeet Tribal Business Council has throughly reviewed all information and has heard objections from the Natural mother of said children, namely, Cheryl Ann Vielle, Blackfeet Enrollee No. 201-12609, now

THEREFORE BE IT RESOLVED: That the Blackfeet Tribal Business Council, acting for in behalf of the Blackfeet Tribe of the Blackfeet Indian Nation, does hereby deny the request from William Joseph Baisley to disenroll minor children, namely, Kristopher Landon Baisley, Blackfeet Enrollee No. 201-U18735 and Willy Brett Baisley, Blackfeet Enrollee No. 201-U18736, and that said children shall remain on the Blackfeet Tribal membership Rolls, with all rights and benefits thereof.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN NATION

s/Earl Old Person
Earl Old Person, Chairman

ATTEST:

s/Marvin D. Weatherwax
Marvin D. Weatherwax, Secretary

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by the Blackfeet Tribal Business Council during a duly called, noticed and convened Special Session held the 17th day of February, 1987 with Seven (7) members present to constitute a quorum and by a vote of Seven (7) members For and None Opposed.

s/Marvin D. Weatherwax
Marvin D. Weatherwax, Secretary
Blackfeet Tribal Business
Council

APPENDIX G

COLORADO COURT OF APPEALS

No. 86CA1110

In re Marriage of	)
	)
WILLIAM JOSEPH BAISLEY,	)
	)
Appellee,	)
	)
and	)
	)
CHERYL ANN VIELLE,	)
	)
Appellant.	)

Appeal from the District Court
of Boulder County

Honorable Murray Richtel, Judge

DIVISION I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Metzger and Criswell, JJ., concur

Edwards, Terrill & Mygatt, P.C.
Nancy Terrill
Boulder, Colorado

Attorneys for Appellee

Holland & Hart
Julia Hook
Susan N.H. Dixon
Denver, Colorado

Attorneys for Appellant

Cheryl Ann Vielle, mother, appeals a trial court order awarding permanent custody of her two minor children to their father, William Joseph Baisley. We affirm.

The father and mother, an alleged enrolled member of the Blackfeet Indian tribe, lived as husband and wife outside the boundaries of the Blackfeet Indian Reservation in Montana from September 1982 until their separation in June 1985. During that time, they had two children.

In June 1985, father moved to Boulder, taking the children with him with mother's consent. During the next six months, mother called to speak to the children only three or four times and visited them in Boulder once, but she did not seek their return.

In January 1986, mother filed for dissolution of marriage and sought custody of the children in a Montana state court. On January 21, 1986, father, after having been served with process in the Montana dissolution proceeding, filed a verified petition for custody under the Uniform Child Custody Jurisdiction Act, § 14-13-101, et seq., C.R.S. (UCCJA) in the Colorado court. The Colorado court contacted the Montana court by telephone to determine which forum should exercise jurisdiction over the custody issue. Concluding that Colorado was the home state of the children and that it had the most significant connections with the children, the Montana court declined to exercise jurisdiction over the custody issue. An oral report of this conference was put on record by the Colorado court.

On April 30, 1986, a temporary custody hearing was held in the Colorado court with both parties present. Pursuant to the parties' agreement, father was given physical custody of the children from April 30 through June 11, and mother was given physical custody from June 11 until the time of the permanent custody hearing. The custody hearing was then set for the end of July.

Father returned the children to mother in June. On July 15, 1986, mother sought and received an ex parte emergency protective order from the Blackfeet tribal court prohibiting removal of the children from the reservation until the question of the proper jurisdiction on the custody issue as between the Blackfeet tribal court and the Colorado court was determined. The tribal court

did not contact the Colorado court at that time or at any time thereafter. On July 18, 1986, counsel for mother filed in the Colorado court a motion to dismiss, or in the alternative, to hear testimony in the Blackfeet tribal court but did not inform the Colorado court of the ex parte order until July 24.

On the morning of the permanent custody hearing, July 28, the trial court denied mother's motions, affirming the propriety of its exercise of jurisdiction and determining that the ex parte emergency protective order issued by the Blackfeet tribal court was not an exercise of jurisdiction in substantial conformity with the UCCJA and that, in any event, that order had expired. Mother's ensuing request for a continuance was denied by the Colorado court. Without

mother present, the hearing proceeded with her counsel participating. Evidence was presented, and permanent custody of the children was awarded to father.

I.

A.

Mother first contends that the Colorado court improperly exercised jurisdiction under the UCCJA. She argues that Colorado was not the children's home state. We disagree. The record completely refutes this contention. Sections 14-13-103 and 14-13-104, C.R.S., were complied with. See Barden v. Blau, 712 P.2d 481 (Colo. 1986); McCarron v. District Court, 671 P.2d 953 (Colo. 1983); In re Marriage of Severn, 44 Colo. App. 109, 608 P.2d 381 (1980).

B.

Mother also contends that the Colorado court's exercise of jurisdiction was improper because custody proceedings were pending in Montana. Again, we disagree.

The UCCJA provides that, in general, if two states have concurrent jurisdiction over custody proceedings, exclusive jurisdiction is conferred on the court in which the matter was first raised. McCarron v. District Court, supra; In re petition of Edilson, 637 P.2d 362 (Colo. 1981). However, pursuant to § 14-13-107, C.R.S., the state in which the initial custody proceeding is pending may stay proceedings if it determines that another state is the more appropriate forum. In re Petition of Edilson, supra. Under Montana law, the decision to decline

exercise of jurisdiction is entirely within the discretion of the trial court. In Re Marriage of Bolton, 690 P.2d 401 (Mont. 1984).

The Colorado court contacted the Montana court to determine the most appropriate forum. See § 14-13-107, C.R.S. Although a contemporaneous record of this consultation was not made, the Colorado court, in denying mother's motion to dismiss, made findings which reflect that the Montana court declined to exercise jurisdiction. Under these circumstances, the Colorado court did not abuse its discretion by exercising jurisdiction.

Because the Colorado court properly exercised home state jurisdiction under § 14-13-104(1)(a), C.R.S., we need not address mother's contentions concerning

jurisdiction under § 14-13-104(1)(b), C.R.S.

II.

Mother contends that the trial court abused its discretion in failing to confer with the Blackfeet tribal court and in denying her motion to hear testimony in the Blackfeet tribal court. We reject these contentions.

Section 14-13-119, C.R.S., permits a party to adduce testimony of witnesses by deposition or otherwise in another state. Section 14-13-120, C.R.S., allows the trial court to request a court of another state to conduct a hearing, to order a party to give evidence under the procedures of that state, or to have social studies made concerning custodial arrangements for a child. Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975).

Mother knew in May that the custody hearing had been set for the end of July. On July 18, 1986, she filed the motion asking the trial court to allow testimony to be heard in the Blackfeet tribal court. Because her attempt to gather evidence in Montana was not undertaken in a timely manner, there was no abuse of discretion in the Colorado court's denial of her motion.

III.

Mother also contends that the trial court abused its discretion in denying her motion for a continuance of the custody hearing. She argues that she was denied due process of law because she was unable to attend the hearing and because the Montana Department of Social Services had not completed a custody evaluation with respect to her. Again, we disagree.

The grant or denial of a continuance is a matter entrusted to the sound discretion of the trial court, and its decision will not be disturbed on review absent a clear abuse of that discretion. Butler v. Farner, 704 P.2d 853 (Colo. 1985); In Re Marriage of Lorenzo, 721 P.2d 155 (Colo. App. 1986).

One of the reasons given for the Montana Department of Social Service's failure to complete its custody evaluation was that the evaluators had tried for two days, but were unable to contact the mother. Mother did not seek a continuance until the morning of the custody hearing. Thirteen days prior to that date, she had sought and received a temporary protective order from the Blackfeet tribal court which prohibited removal of the children from the

Blackfeet Indian reservation and purported to raise in the Blackfeet tribal court the question of the Colorado court's jurisdiction. On July 24, 1986, the Colorado court ordered her to appear at the custody hearing on July 28, but she did not comply.

On the basis of these facts, the Colorado court concluded that mother's request for a continuance was interposed solely for delay, see Butler v. Farner, supra, and that it was mother's voluntary absence, not the denial of the continuance or the lack of a completed custody evaluation, which prevented presentation of witnesses and evidence on her behalf. Accordingly, there was no abuse of discretion in the Colorado court's denial of a continuance.

IV.

Mother next contends that the Colorado court erred in refusing to recognize the Blackfeet tribal court's ex parte emergency protective order. We disagree.

The Blackfeet Tribal Law and Order Code, Ch. 2, §1 (Blackfeet Code) gives a state court and the tribal court concurrent, nonexclusive jurisdiction of all suits concerning a member of the tribe. The Blackfeet Code, Ch. 3, §§1 & 2, allows a state court to exercise jurisdiction over marriage and divorce and provides that marriage and divorce shall be governed by state law. These provisions have been interpreted to allow a state court to make determinations of issues that are incident to divorce such as child custody. See United States

ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974); Application of Bertelson, 189 Mont. 524, 617 P.2d 121 (1980).

Mother voluntarily invoked the Montana court's jurisdiction for divorce and, incident thereto, sought determination of the children's custody. Thereafter, the Montana court determined that Colorado was the proper state in which the custody issue should be decided, and the Colorado court properly assumed jurisdiction.

Under §14-13-107(1), C.R.S., Colorado courts may not proceed on a petition for custody if another court is "exercising jurisdiction substantially in conformity with [the UCCJA]" and that court refuses to stay its proceedings. However, a Colorado court is free to

determine whether the other court is proceeding in substantial conformity with the jurisdictional requirements of the UCCJA. Bakke v. District Court, 719 P.2d 313 (Colo. 1986).

By the express terms of the Blackfeet Code, the state court was given jurisdiction over divorce and custody matters arising incident thereto. See United States ex rel. Cobell v. Cobell, supra. Thus, by failing to contact the trial court where the custody matter was pending, the Blackfeet tribal court did not act in substantial conformity with the UCCJA. See § 14-13-107, C.R.S.; McCarron v. District Court, supra. Accordingly, we find no error in the Colorado court's refusal to recognize the ex parte temporary protective order. See Bakke v. District Court, supra.

Even if there had been jurisdiction properly exerted by the tribal court, the petition for the ex parte order and, implicitly, the order itself acknowledged that the jurisdictional question was being considered in the Colorado court. The order states only that the children were to be confined on the reservation until the jurisdictional problem was resolved. This jurisdictional dispute was determined by the Colorado court, and therefore, once it had determined the jurisdictional issue, the trial court properly declared that the tribal order, even if valid, had expired.

We reject mother's contention that federal law preempts state court jurisdiction over custody disputes arising in the context of a Native American divorce proceeding. Mother concedes that the

Indian Child Welfare Act, 25 U.S.C. §1901, et seq., is not applicable to a divorce proceeding in which child custody is in dispute. 25 U.S.C. §1903; In re Custody of S.B.R., 43 Wash. App. 622, 719 P.2d 154 (1986). Moreover, 25 U.S.C. §1322 cannot be interpreted to preempt state court jurisdiction in such matters. Nor are we aware of any other federal authority governing child custody in a dissolution proceeding in which a tribal member was a party that would preempt state court jurisdiction. See generally Estate of Standing Bear v. Belcourt, 631 P.2d 285 (Mont. 1981).

Judgment affirmed.

JUDGE METZGER AND JUDGE CRISWELL concur.

Appendix H

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 86CA1110

In re the Marriage of:	)	
	)	
WILLIAM JOSEPH BAISLEY,	)	
	)	
Appellee,	)	
	)	
and	)	ORDER
	)	
CHERYL ANN VIELLE,	)	
	)	
Appellant.	)	

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 1-4-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Pierce, J.

Metzger, J.

Criswell, J.

DATED: 12-3-87

Appendix I

SUPREME COURT, STATE OF COLORADO
Case No. 87SC495
Certiorari to the Colorado
Court of Appeals 86CA1110
Boulder County District Court
86DR117-2

ORDER OF COURT

In re the Marriage of:

CHERYL ANN VIELLE,

Petitioner,

and

WILLIAM JOSEPH BAISLEY,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 9, 1988.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

Holland & Hart
M. Julia Hook
Susan N.H. Dixon
555 17th Street, Suite 2900
P.O. Box 8749
Denver, CO 80201

Edwards, Terrill & Mygatt, P.C.
Nancy Terrill
1227 Spruce Streete
Boulder, CO 80302

Honorable Murray Richtel
Boulder County District Court
Civil Courts Building
2025 Fourteenth Street
Box 471
Boulder, CO 80306

(2)

No. 88-220

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CHERYL ANN VIELLE,

Petitioner,

v.

WILLIAM JOSEPH BAISLEY,

Respondent.

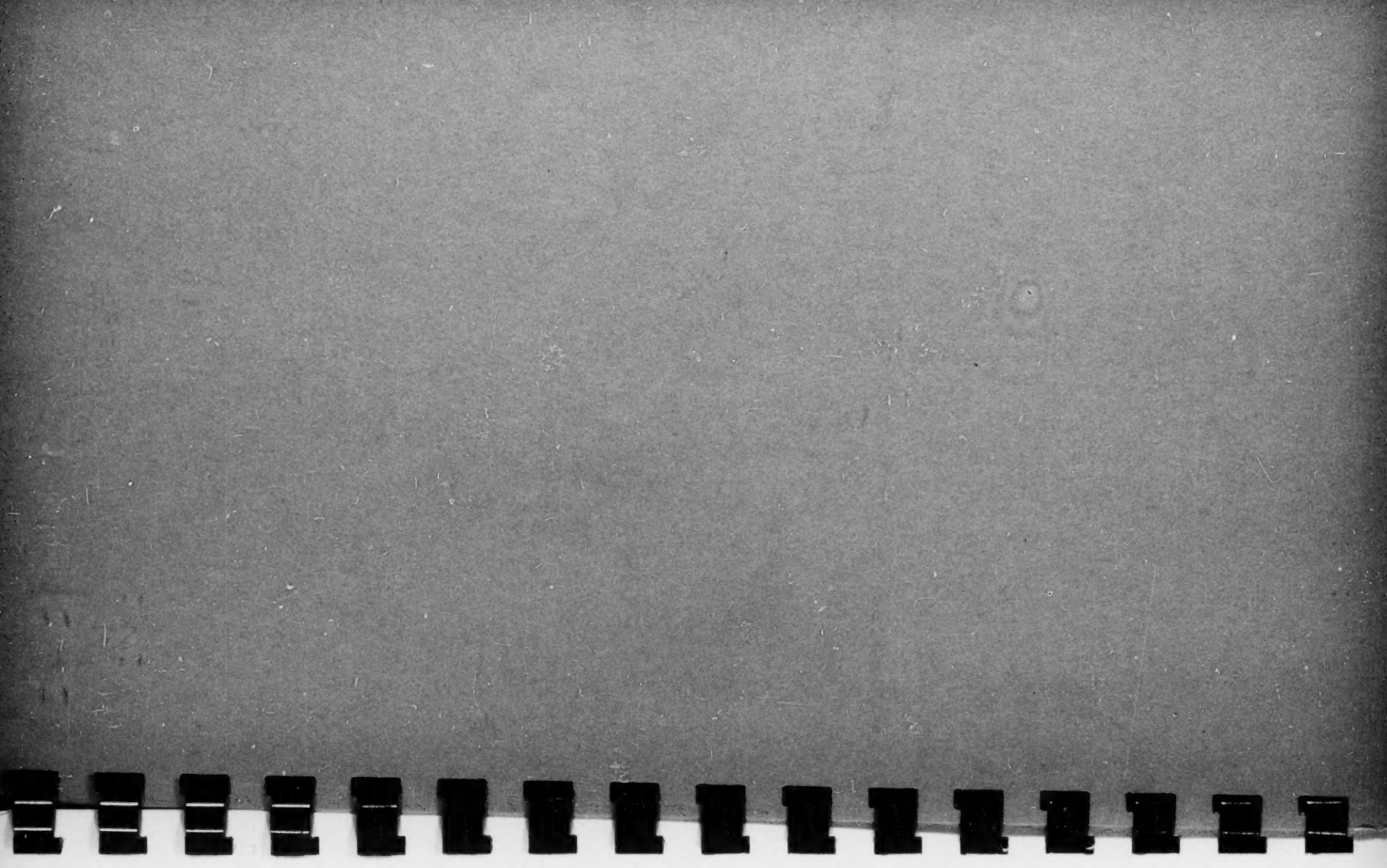
BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

Nancy S. Terrill
EDWARDS, TERRILL & PIZZI
1227 Spruce Street
Boulder, Colorado 80302

Attorney for Respondent
William Joseph Baisley

September 22, 1988

37 pp



QUESTION PRESENTED

Respondent disputes the phrasing of the question by Petitioner. The question should be as follows: did the Colorado Court of Appeals err in affirming the Colorado District Court's exercise of jurisdiction of a dispute involving the custody of two non-Indian children born to an Indian mother and a non-Indian father, in which the parents had married off the reservation and had always resided off the reservation?

LIST OF PARTIES

Respondent has no dispute with Petitioner's list of parties.

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No. 88-220

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CHERYL ANN VIELLE,

Petitioner,

v.

WILLIAM JOSEPH BAISLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

Respondent, William Joseph Baisley, respectfully prays that this Court deny Petitioner's Writ of Certiorari to review the judgment of the Colorado Court of Appeals entered on November 5, 1987. The Respondent has no corrections or additions to Petitioner's recitation of the procedural history and lower opinions in this case.

JURISDICTION

Respondent submits that 28 U.S.C. §1257(3) (1970) does not confer jurisdiction on this Court in that there are no rights or privileges conferred by any federal statute or regulatory scheme which are implicated by the Court of Appeals' decision. Further, pursuant to Supreme Court Rule 17, the Colorado Court of Appeals' decision is not in conflict with any Supreme Court decision in this area of law.

STATUTES INVOLVED

The Respondent has the following statutes to add to those included by Petitioner:

1. Indian Child Welfare Act, 25 U.S.C. §1901 et seq.

2. Colorado Uniform Child Custody Jurisdiction Act, C.R.S. §14-13-101 et seq.

3. Blackfeet Tribal Law and Order Code, Chapt. 3, §8:

> All members of the Blackfeet Indian Tribe shall hereafer be governed by state law and subject to state jurisdiction with respect to adoptions hereafter consummated.

STATEMENT OF THE CASE

Petitioner is bound by the trial court record in this case. "The Supreme Court cannot consider facts not brought to its notice by the record." Congress & Empire Spring Co. v. Knowlton, 103 U.S. 49, 26 L.Ed. 347 (1880). Yet the uncontradicted evidence in the record in this case fails to establish many of Petitioner's statements under her Statement of the Case. Given these misstatements and the importance of the facts misstated, i.e. that the parties' children are Indians, the Respondent has requested the Clerk of the Colorado Court of Appeals to certify the record to the Court.

In 1982, the parties began living together in Montana off the Blackfeet Reserva-

tion, thereby establishing a common law marriage under Montana law. Two sons were born to the parties, one in April, 1983 and one in May, 1984. Both births took place off the reservation and the parties never resided on the reservation during the time that they were together. The trial court record establishes that the Respondent and the children moved to Colorado, with the Petitioner's consent, in mid-July of 1985. On January 7, 1986, the Petitioner initiated a divorce action in Montana State Court. On January 21, 1986, the Respondent petitioned the Boulder, Colorado District Court to take jurisdiction over child custody under the Uniform Child Custody Jurisdiction Act, C.R.S. §14-13-101 et seq. (hereinafter "U.C.C.J.A.") On January 31, 1986, there was a telephone conference between the Montana and the Colorado judges concerning U.C.C.J.A. jurisdiction, which

resulted in the Colorado judge retaining jurisdiction over child custody. On April 30, 1986, the parties appeared in Boulder District Court for a temporary custody hearing and stipulated to joint custody pending the final custody hearing. The parties further stipulated that the father would have the children for the following six weeks and would be responsible for transporting the children to the Petitioner in mid-June, 1986 and that the Petitioner would have the children with her from mid-June, 1986 until the time of the custody hearing, July 28, 1986. The Petitioner was specifically ordered to bring the children to Boulder for the permanent custody hearing in July and she acquiesced in that order. The Respondent delivered the children to the Petitioner in mid-June, 1986. On July 15, 1986, Petitioner obtained an emergency protective custody order from the Blackfeet

Tribal Court. Prior to issuing the emergency order, the Blackfeet Tribal Judge gave no notice to the Respondent or to the Boulder District Court, and made no attempt to obtain a conference with the Colorado Court, despite knowing of the pending custody case in that court. On July 24, 1986, the Boulder District judge, having been informed informally of the Tribal Court order, attempted to reach the Tribal Court judge on the telephone, but failed to get through to the Tribal Court judge. On July 28, 1986, the Petitioner failed to appear for the permanent custody hearing and failed to produce the children as ordered. The Boulder District Court entered an order for sole permanent custody to the Respondent.

It is critical to the Court's consideration of this Writ to understand that the trial court judge had no evidence that the children

were enrolled members of the Blackfeet Tribe. In fact, the only evidence concerning enrollment in the trial court was from an Indian witness, Karen Whiteman, who testified that the Petitioner had told her that the children were not eligible for enrollment in the tribe because of lack of sufficient Blackfeet blood, and that the Petitioner intended to fraudulently c tain the childrens' enrollment. However, there was no evidence as to whether the enrollment had been obtained. Therefore, the trial judge had before him a case involving non-Indian children, a non-Indian father and all relevant actions occurring off the reservation. The only contact with the Blackfeet Tribe was that the mother was apparently an enrolled member of the Blackfeet Tribe.

Petitioner showed total disregard for the state court's jurisdiction and lawfully

entered orders by the following actions: voluntarily invoking state court jurisdiction in Montana, following through and obtaining a divorce decree from the Montana State Court, voluntarily appearing in the Colorado custody action, stipulating to a temporary visit with the children from mid-June to the end of July, 1986, stipulating to return the children to the Boulder District Court for the permanent custody hearing and then seeking refuge in the tribal court when she did not like the result of the proceedings in Montana and Colorado, shows her total disregard for the state court's jurisdiction and lawfully entered orders. The Petitioner had an opportunity to be heard, had notice of all proceedings, agreed to participate in the proceedings in Colorado, and then blatantly sought the protection of a third forum in an attempt to obtain the results she wanted.

REASONS FOR NOT GRANTING THE WRIT OF CERTORIARI

This case involves a non-Indian father, non-Indian children and a family who never lived on the reservation. The Blackfeet Tribal Court in this case has a very minor interest in the custody dispute between the parties. Conversely, the state courts have strong state interests in resolving the custody dispute involving four of its citizens in an action based on marriage, birth and residency which had occurred totally within state boundaries and off the Blackfeet Reservation. Given the lack of impact on the Tribe, there is no federal interest, right or policy affected by this case.

The Colorado Court of Appeals properly found that state courts have at least concurrent jurisdiction over divorce and custody matters on the facts of this case and that

given such state interests and the facts of the case, there was no preemption by federal law. This opinion by the Colorado Court of Appeals is in complete accordance with previous holdings of this Court and of lower federal courts concerning tribal court jurisdiction. There were no legal errors contained in the opinion of the Colorado Court of Appeals.

I. COLORADO PROPERLY TOOK JURISDICTION IN THIS CASE

A. Montana and Colorado State Courts have Jurisdiction over Divorce and Custody Matters Involving State Residents.

It cannot be denied that state courts have jurisdiction over residents of the state. There is a strong state interest in aiding in the resolution of disputes between its residents. This is true even for state residents who happen to be Indians, when they are living off the reservation.

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973); Accord, Organized Village of Kake v. Egan, 369 U.S. 60 (1962). F. Cohen, Handbook of Federal Indian Law, p. 119 (1945).

In the area of divorce and custody proceedings, this Court has held that:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state and not to the laws of the United States.

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

There is a marked lack of federal laws in the child custody area. In fact, in only one area of Indian domestic relations has Congress deemed it important to preempt the

states. The Indian Child Welfare Act, 25 U.S.C. §1901 et seq. establishes comprehensive standards for tribal versus state jurisdiction in dependency and neglect cases and cases involving termination of parental rights. The Act specifically exempts from its coverage child custody proceedings as part of divorce cases. 25 U.S.C. 1903(1). In so doing, Congress has clearly left to the states jurisdiction of private custody cases.

B. Federal Law Does not Preempt the Assertion of State Court Jurisdiction in this Case nor is Federal Preemption Analysis even Applicable to the Facts of this Case.

Petitioner bases her preemption argument on federal policy as expressed in the Indian Civil Rights Act, 25 U.S.C. §1322 (1982) and its predecessor Public Law 280 (Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588). Neither Act applies to this case; preemption analysis is therefore irrelevant.

The Indian Civil Rights Act, 25 U.S.C. §1322 (1982) provides that the state may, with the consent of the tribe, assume jurisdiction over civil matters "which arise in the areas of Indian country situated within such state". 25 U.S.C. §1322 (1982). Thus, clearly, that on its face, the Act does not apply to causes of action which arise beyond the boundaries of the reservation. In Section 1322(a) of the Act, the language in part is as follows:

> The consent of the United States is hereby given to any state not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such state. . . (Emphasis added)

The Act addresses lack of state court jurisdiction over actions involving two Indians, or an action in which an Indian was a party which arose in the area of Indian country. Neither

of these facts are present in this case. Also, §1326 of the Act provides that state jurisdiction pursuant to this title shall be applicable in Indian country where the Indians have accepted such jurisdiction in accordance with the Act. Again, Respondent stresses the fact that the marriage between the parties took place off the reservation, the children were born off the reservation and never lived there until they were allowed to go there by a Colorado district court order. The parties and children never resided on the reservation during the marriage. The parties' divorce and custody action was filed by Petitioner in state court. There is absolutely no cause of action in this case which arose in Indian country. Further, the fact that the Respondent is not a member of the tribe who has no connections with Indian country mitigates

against any application of the Civil Rights Act.

Montana's divorce and custody code predated and survived the passage of Public Law 280, supra and the Indian Civil Rights Act. State ex rel. Ironbear v. District Court, 512 P.2d 1291 (Mont. 1973). In Ironbear, the Montana Supreme Court decided, after applying the infringement test set forth in Williams v. Lee, 358 U.S. 217 (1959) to apply state divorce law in state court to Indian parties living on the reservation. The court found no exclusive control by the United States nor any interference with tribal self-government. Under the Ironbear analysis, Public Law 280 and the Indian Civil Rights Act are not even applicable to this case.

Petitioner argues that the Tribal Code's grant of jurisdiction to the state court is insufficient in light of Kennerly v. District

Court of Montana, supra. Respondent is not arguing that these Tribal Code sections comply with the consent to jurisdiction requirement of either Public Law 280 or 28 U.S.C. 1322. Rather, Respondent argues that these Code provisions do not even apply to state exercise of jurisdiction in this case.

Petitioner cites no other federal policy, statute or regulatory scheme in support of her preemption argument, but asserts, incorrectly, that she need not present an express congressional statement of intent upon which to predicate preemption. She improperly cites California v. Cabazon Board of Indians, 107 S.Ct. 1083 (1987) and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) for this proposition. In fact, those cases hold that some federal law or regulatory scheme is vital to preemption analysis.

Cabazon, supra clearly states that there is no inflexible per se rule precluding state court jurisdiction over tribes and their members in the absence of an express congressional grant. Petitioner's reliance on vague sovereignty language is outdated. In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), this Court stated:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. (Citing Mescalero Apache Tribe v. Jones, 411 U.S. 145). The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886), with Kennerly v. District Court, 400 U.S. 423, 90 S.Ct. 480, 27 L.Ed.2d 507 (1971).

It is clear that the language of the Indian Civil Rights Act itself is not applicable to the case at bar and there is no other federal policy in place which would recognize exclusive Indian jurisdiction based on self-determination or sovereignty in a case involving a non-Indian defendant in actions that occurred off the reservation.

Petitioner also relies on the importance of tribal court jurisdiction as part of her preemption argument. However, the facts of this case all undermine such reliance. Every relevant action occurred off the reservation: the parties' marriage, the birth of their children, their residency during the marriage, and their divorce. The only action which occurred on the reservation was the Petitioner's temporary visit with the children for one month prior to the filing of her Tribal Court action. Petitioner cannot be allowed to argue

that the domicile of the children was on the reservation. The most Petitioner can properly argue is that the children were physically present on the reservation on a grant from the Colorado court at the time of her filing.

Five of the preemption cases cited by Petitioner actually contradict her position: they all turned on the fact that all relevant actions occurred on the reservation, not off of it. The remaining cases cited by her, the state taxation cases, are inopposite. Fisher v. District Court, 424 U.S. 382 (1976) (domestic relations matter, both parties were members of the Crow Tribe, the dispute arose on the reservation, and no important facts had occurred off the reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribe's taxation of Indian mining activities on the reservation); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985);

R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983); and Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 (1987) (transactions occurring solely on the reservation).

The remaining cases Petitioner cites to support her preemption argument dealt with issues of state taxation over a non-Indian doing business on a reservation in Arizona. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) the non-Indian was asserting sovereignty to try to bar state taxation resulting from its business relationship within the tribe. It was held that the state tax was invalid. The court reasoned that the state's generalized interest in raising revenue in this case was insufficient to permit intrusion into the federal regulatory scheme. In McClanahan v. Arizona State Tax Commission, supra the narrow question was if

the state may tax a reservation Indian for income earned exclusively on the reservation. It was held that by the state imposing the tax in question the state interfered with matters which relevant treaty and statute left to regulation by the federal government. McClanahan at 165, 168. State taxation preemption cases cannot be used as a precedent to support preemption in this case. State taxation and regulation of Indian land has consistently held to be preempted by federal law. Unlike the power to tax which is inherent in sovereignty, state jurisdiction to decide the custody of children whose parents are both Indian and non-Indian is not one which will interfere with tribal sovereignty.

Petitioner has cited no case in support of tribal court jurisdiction involving facts similar to this case. In fact, there are many decisions of this Court which support the

decision of the Colorado Court of Appeals. In Williams v. Lee, supra the Court described the history of federal protection of tribal jurisdiction. The Court stated:

> Over the years this court has modified these principals in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . . Thus suits by Indians against outsiders in state courts have been sanctioned.

In Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984), this Court held that state jurisdiction over non-Indian claims against Indians was an impermissible intrusion on self-government but that state jurisdiction over the claims of an Indian plaintiff against a non-Indian defendant was lawful since there was no interference with the right of tribal Indians to govern themselves.

This Court's decisions in Williams v.

Lee, supra; Three Affiliated Tribes v. Wold Engineering, supra; and Mescalero, supra all make it clear that the Court does not consider the interests of the Indian Tribal Court sufficient to give it exclusive jurisdiction in a case such as the one at bar. Petitioner's arguments simply confuse this Court's decisions in different areas of Indian law. This would be a far different case if it involved two Indian parties, facts which occurred on the reservation or an area of law in which Congress has undertaken regulation or statutory preemption. In the absence of those facts, Petitioner's arguments are not relevant.

C. The Infringement Test, if Applicable, Would Allow the State Court's Exercise of Jurisdiction.

As Respondent has established, preemption analysis is not applicable in this case. The next level of analysis is the

"infringement test" first enunciated by the Supreme Court in Williams v. Lee, supra which Petitioner has chosen to ignore.

In Williams the issue was whether a non-Indian trader who operated a store on the reservation could bring an action in state court to collect a bill owed him by Indians who lived on the reservation and who had purchased goods on credit. This Court set forth the infringement test as follows:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams at p. 220. On those facts, the Williams Court found that state court jurisdiction would undermine the authority of the tribal court. The court relied heavily on the fact that the Navahoes had a functioning court system which could handle the controversy.

The Williams infringement test has been limited primarily to attempted exercises of jurisdiction over non-Indians. Indeed, the facts in the present case all point toward the minimal tribal interest and the substantial state interest in the controversy. McClanahan v. Arizona State Tax Commission, supra makes it clear that the infringement test should be used in cases involving a non-Indian defendant in which all of the relevant transactions occurred outside the reservation in that in these situations both the tribe and state could fairly claim an interest in asserting their respective jurisdictions. McClanahan at 129.

In this case, the state is merely providing a forum for the non-Indian defendant and the Indian plaintiff. There is no interference with tribal self-government

because the tribe has no governmental interest in protecting non-Indian defendants.

> Where the parties are Indian and non-Indian and the transaction occurred off the reservation, the interest of the tribe in adjudicating the matter would necessarily be small and the possibility of interference with tribal self-government negligible.

F. Cohen, Handbook of Federal Indian Law, pages 94-98 (1945).

II. THE COLORADO COURT OF APPEALS CORRECTLY INTERPRETED THE BLACKFEET TRIBAL CODE IN ITS JURISDICTIONAL ANALYSIS

The Blackfeet Code does not specifically address the matter of child custody proceedings. Where the Code does deal with the issue of domestic relations such as marriage and adoption, it specifically grants state courts jurisdiction. Chapter 3, Sec. 1 of the Code provides that all members of the Blackfeet Indian Tribe shall hereafter be governed by

state law and subject to state jurisdiction with respect to marriages. It also provides that common law marriages will not be recognized. Chapter 3, Sec. 8 of the Code provides that all members of the Blackfeet Indian Tribe shall hereafter be governed by state law and subject to state jurisdiction with respect to adoptions hereafter consummated. Chapter 2, Sec. 1 of the Tribal Code grants concurrent civil jurisdiction to state courts when the defendant is a member of the tribe. Although this section does not have direct application to this case, it indirectly suggests that the Blackfeet Tribe wish to obtain some ability to protect its members who are brought into court by a non-Indian plaintiff. Because this section of the Code only mentions Indian defendants in civil matters, it acknowledges the fact that an Indian court does not have

jurisdiction over a non-Indian defendant in matters not connected with the reservation.

Further, the fact that the Code does not even recognize common law marriages coupled with the fact that the parties established their marriage through Montana common law, means that parties could not have filed the divorce action in the Tribal Court. In the absence of a remedy in the Tribal Court, state courts would have to provide a forum to the parties to resolve their case. See, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986); William v. Lee, supra.

The Colorado Court of Appeals relied on United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974). In Cobell, the Court held that the Blackfeet Code of Montana gave jurisdiction over divorce and related custody matters to the state courts in cases

involving Indian parties. The Colorado court properly relied on the Cobell case, in that it is directly on point on this issue and it has not been overturned. In fact it has been cited and relied on by many later cases. Petitioner argues that Cobell is no longer good law in that it ignores the decisions of this Court in Kennerly, supra; Merrion v. Jicarilla Apache Tribe, supra and R.J. Williams Co. v. Fort Belknap Housing Authority, supra. The language which Petitioner takes from those cases in order to urge this Court to overturn the Cobell decision is general in nature, and does not represent holdings of those cases. As discussed previously, each of those cases involved transactions which occurred solely on the Indian reservations, and such facts were central to the Court's reasoning in the cases.

CONCLUSION

The opinion of the Colorado Court of Appeals is in full accord with numerous opinions of this Court on the proper exercise of state court jurisdiction in cases involving non-Indian defendants in transactions occurring off the reservation. For that reason, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 88-220

In The
Supreme Court of the United States
October Term, 1988

CHERYL ANN VIELLE,
Petitioner,

v.

WILLIAM JOSEPH BAISLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

MOTION OF BLACKFEET TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

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MOTION OF BLACKFEET TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The Blackfeet Tribe of the Blackfeet Reservation in Montana respectfully moves this Court for leave to file an amicus curiae brief in support of the Petition for Certiorari filed in this case on August 8, 1988. Petitioner has consented to the filing of an amicus brief by the Blackfeet Tribe, and the letter of consent has been lodged with the Court. The Respondent has denied consent.

The Blackfeet Tribe of the Blackfeet Indian Reservation is a federally recognized tribe organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986. The Blackfeet Tribal Business Council is the governing body of the Blackfeet Reservation, and is responsible for, among other things, representing, developing and protecting the interests of its members.

This case involves three issues of vital importance to the Blackfeet Tribe: the well-being and continuing security of two tribal member children; the integrity of the jurisdiction and authority of the Blackfeet Tribal Courts; and the integrity of tribal law. Each of these issues can be adequately addressed only by the Blackfeet Tribe.

The custody dispute at issue involves three tribal members, the two minor children and their mother, Cheryl Ann Vielle. The children and their mother are duly enrolled members of the Tribe, having met all membership criteria established by the Blackfeet Constitution. Child custody placement of member children is of utmost concern to the Blackfeet Tribe, and the Tribe has an interest

independent from the Petitioner and Respondent to insure that placement of tribal member children is appropriate.

In addition, the jurisdiction and authority of the Blackfeet Tribal Courts to determine the custody of member children is directly raised in this case. The Blackfeet Tribe has a vital interest in ensuring that its Tribal Courts are given the respect and deference by state courts required by law and principles of comity. Both comity and the specific provisions of the Uniform Child Custody and Jurisdiction Act as adopted by Colorado, *see* C.R.S. 14-13-101 *et seq.*, require that the Tribal Court be given proper consideration in determinations concerning the appropriate forum to make custody decisions involving tribal member children.

Finally, the Blackfeet Tribe has a strong interest in ensuring that its tribal laws are applied and interpreted correctly. Blackfeet Tribal laws have been raised in and interpreted by the Colorado courts, but the courts have looked to the wrong law. The integrity of tribal law has been put at issue because the Colorado courts did not attempt to identify the correct tribal law, nor did they defer to tribal court for the correct interpretation of the law.

Based on the above interests, the Blackfeet Tribe requests that its Motion for Leave to file an amicus brief in support of the Petition for Certiorari be granted.

Respectfully submitted,

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September 1988

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INTEREST OF AMICUS CURIAE BLACKFEET TRIBE

The interests of the Blackfeet Tribe are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Petitioner and are incorporated herein by reference.

STATUTES INVOLVED

In addition to the statutes set out in the Petition for Certiorari at 4-8, the following statutes are also relevant.

BLACKFEET TRIBAL LAW AND ORDER CODE—PREFACE:

> The Blackfeet Tribal Law and Order Code of 1967, as amended is a Code written by the Blackfeet Tribe to be administered within the exterior boundaries of the Blackfeet Reservation of Montana, and under no condition does the State of Montana have jurisdiction over this Code, and further that any portion now in the Blackfeet Tribal Law and Order Code of 1967, as amended relating to concurrent jurisdiction with said State of Montana or giving any jurisdiction to the said State of Montana, be hereby deleted and such language shall be of no further force or effect.
>
> (Adopted by Ordinance No. 44, Blackfeet Tribe, December 13, 1974).

C.R.S. 14-13-107. SIMULTANEOUS PROCEEDINGS IN OTHER STATES:

> (1) A court of this state shall not exercise its jurisdiction under this article if at the time of filing the petition a proceeding concerning the custody of the

child was pending in a court of another state exercising jurisdiction substantially in conformity with this article, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties under section 14-13-110 and shall consult the child custody registry under section 14-13-117 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending, to the end that the issue may be litigated in the more appropriate forum and that information may be exchanged in accordance with sections 14-13-120 to 14-13-123. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court, to the end that the issues may be litigated in the more appropriate forum.

C.R.S. 14-13-108. INCONVENIENT FORUM:

(1) A court which has jurisdiction under this article to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

SUMMARY OF ARGUMENT

Certiorari should be granted in this case in order to determine and clarify the status of Indian tribes and tribal courts under the Uniform Child Custody and Jurisdiction Act (hereinafter UCCJA) in child custody disputes in state courts involving tribal members and tribal member children. Tribes and tribal courts ought to be treated as states under the UCCJA for determining jurisdictional disputes between tribal courts and state courts in such cases. Where tribal members are involved, tribal courts have jurisdiction to determine custody matters. Tribes have interests at least equal to, if not greater than, states in insuring that child custody matters involving tribal member children are determined in the most appropriate forum, and that cooperation is maximized and competition is minimized between tribes and states exercising jurisdiction in such matters.

In this case, the Blackfeet Tribal Court was not treated as an entity having authority to decide a custody dispute involving tribal member children in part because the Colorado Court of Appeals determined that tribal law had conferred jurisdiction on the Montana courts. However, the Colorado court relied on a tribal law which is no longer effective and which was specifically amended in 1974 to make clear that no jurisdiction was conferred on state courts. *See* Preface to Blackfeet Law and Order Code, reprinted *supra* at 6. In addition, the Colorado court erred by not deferring to the Tribal Court for interpretation of its own law and its own jurisdiction.

REASONS FOR GRANTING THE WRIT

THE JURISDICTIONAL ISSUES IN THIS CUSTODY ACTION AS BETWEEN TRIBAL COURT AND THE COURT OF ANOTHER STATE ARE SUBSTANTIAL AND IMPORTANT.

1. This Case Raises a Novel and Important Issue As to the Applicability of the UCCJA Where Tribal Courts Are Involved.

In this case, three different courts potentially have jurisdiction over the custody of the children involved—the Colorado court, the Montana court and the Blackfeet Tribal Court. Under the UCCJA, the Colorado court determined the more appropriate forum as between the Colorado and Montana courts, but it failed to determine the more appropriate forum as between the Colorado and Blackfeet Tribal courts.

The UCCJA was adopted by Colorado in 1963. *See* C.R.S. 14-13-101 *et seq.* The stated purpose of the Act, among others, is to:

> (a) Avoid jurisdictional competition and conflict with courts of other states . . . ; (b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child; (c) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available. . . .

C.R.S. 14-13-102(a) - (c). Even if the Colorado court has jurisdiction, it is not required to exercise it if the purposes of the Act would be furthered by refraining from

the exercise of its jurisdiction. *In re Nicholson,* 648 P.2d 681 (Colo. App. 1982). Specifically, a Colorado court may decline to exercise its jurisdiction if it finds it is an "inconvenient forum" and that a court of another state is a "more appropriate forum." C.R.S. 14-13-108, reprinted *supra* at 7.

In addition, the Colorado court is required to contact the court of another state if there is reason to believe proceedings may be pending in that state, C.R.S. 14-13-107(2), or "[i]f the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court, to the end that the issues may be litigated in the more appropriate forum," C.R.S. 14-13-107(3), both reprinted *supra* at 7.

The issue of whether an Indian Tribe and its tribal court are to be treated like a state under the UCCJA has not been widely litigated. However, courts in both Arizona and Montana have determined that the UCCJA applies to jurisdictional conflicts in child custody matters between a state and a tribe. In *Martinez v. Superior Court, La Pa County,* 731 P.2d 1244, 1247 (Ariz. App. 1987), the Arizona court held that "Indian reservations are territories or possessions of the United States as used in the Uniform Child Custody Jurisdiction Act. . . ." *Id.* The court determined that the Act was applicable at least as to those provisions that do not require reciprocity, even though the Tribe involved had not adopted the Act. *Id.* at 1248. The court therefore applied the Act and determined that the state court was an inconvenient forum, that the tribal court was a more appropriate forum, and on remand directed the lower court to decline to exercise its jurisdiction.

Similarly, in *In re Custody of Zier,* 750 P.2d 1083 (Mont. 1988), the Montana Supreme Court applied the Montana UCCJA to determine the more appropriate forum as between the State court and the Crow Tribal Court in a child custody case. The lower court's determination that the tribal court was the more appropriate forum was affirmed by the Supreme Court.[1]

This Court should confirm the application of the UCCJA to jurisdictional conflicts involving states and tribes based on the above cases and the purposes and intent of the UCCJA. On remand, the Colorado court should be directed to make a determination of the more appropriate forum under the UCCJA as between the Colorado court and the Blackfeet Tribal Court. Here, the Blackfeet Tribe has jurisdiction over the custody issue, *see* Part 2 *infra,* and has in fact exercised its jurisdiction. *See* Emergency Protection Order issued by the Blackfeet Tribal Court on July 15, 1986, Appendix C to the Petition.

In the proceedings below, the Petitioner repeatedly argued that the Blackfeet Tribal Court was, and is, the more appropriate forum to determine custody of the tribal member children, and that the Colorado court erred in not conferring with the Tribal Court. Even when the Colorado court became aware that the Tribal Court had issued the Emergency Protective Order on July 15, 1986,

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[1] The facts of the *Zier* case are very similar to the facts in the present case. *See* Statement of Facts in Petition for Certiorari. In *Zier,* the father moved with the children away from the Reservation. The mother had been a student attending school away from the Reservation, but her residence was the Reservation. The grandparents lived on the Reservation. Proceedings were begun in tribal court but had not been concluded at the time of the state court action.

it neglected to contact the Tribal Court as required by C.R.S. 14-13-107(2) or C.R.S. 14-13-107(3) "to the end that the issues may be litigated in the more appropriate forum." *Id.*[2]

The Emergency Protective Order of the Tribal Court granted custody of the minor children to Petitioner "pending litigation of the issue of which forum is more appropriate to determine the custody placement of enrolled members of the Blackfeet Indian Tribe who are residing on the Blackfeet Indian Reservation." It further ordered that the minor children were not allowed to "leave the exterior boundaries of the Blackfeet Indian Reservation pending litigation of this jurisdiction issue." At the July 28, 1986, hearing in the Boulder County District Court, the Court ignored the Blackfeet Tribal Court Order because "the jurisdictional issue has been litigated." However, the District Court never determined the more appropriate forum as between the Colorado court and the Blackfeet Tribal Court, and thus only the jurisdictional issue as between the Montana and Colorado courts was litigated.

The Colorado Court of Appeals found that because the Blackfeet Tribal Court failed to contact the Colorado court, it did not act in substantial conformity with the

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[2] The facts of this case provide adequate grounds for the Colorado court to determine that the Tribal Court was the more appropriate forum. The marriage was begun on the Reservation. The mother was a lifelong resident of the Reservation except for time away to attend school. The father was a resident of the Reservation until he left with Petitioner for school purposes. The children had been in Colorado only six months prior to the time the Colorado court proceeding was filed.

UCCJA, and thus the Court found no error in the District Court's refusal to recognize the Blackfeet emergency protective order. Appendix G-15. However, the District Court also had the responsibility to contact the Tribal Court pursuant to C.R.S. 14-13-107(2) once it learned of the Blackfeet Tribal Court order to inform the Tribal Court of the Colorado proceeding "to the end that the issues may be litigated in the more appropriate forum." *Id.*

Clearly, the Colorado court did not treat the Tribal Court in the same manner it would treat another state court under the UCCJA. The Colorado court failed to comply with the requirements of the UCCJA and principles of comity when it failed to contact the Tribal Court. This Court ought to grant certiorari to clarify the status of the Blackfeet Tribal Court as a state or its equivalent under the UCCJA, and the duties and responsibilities of the Colorado courts vis-a-vis the Blackfeet Tribal Court under the Act.

2. Tribal Law Provides for Tribal Court Jurisdiction in This Case

The Court of Appeals held that tribal court jurisdiction need not be considered because "[b]y express terms of the Blackfeet Code, the state court was given jurisdiction over divorce and custody matters," citing *United States ex rel. Cobell v. Cobell,* 503 F.2d 790 (9th Cir. 1974). Appendix G-15. The tribal law relied on by the Court, however, was amended in December 1974, and thus the Court looked to the wrong law!

By Ordinance dated December 13, 1974, the Blackfeet Law and Order Code was amended to delete all references

to concurrent jurisdiction and any grant of jurisdiction to the State of Montana. *See* Preface to Blackfeet Law and Order Code reprinted *supra* at 6. Thus, at least since December, 1974, the Blackfeet Tribe has regularly exercised jurisdiction over divorces and custody matters involving tribal members.

Where conflicts between state and tribal courts are involved, special considerations, in addition to traditional UCCJA considerations, come into play. As the Montana Supreme Court stated in *Application of Bertelsen,* 617 P.2d 121, 128 (Mont. 1980):

> Although presence and domicile are handy jurisdictional rules, these tests largely ignore the ethnic identity of the child and cultural ties to the tribe.
>
> * * *
>
> An assumption of state court jurisdiction over Indian child custody disputes poses a substantial risk of conflicting decisions which potentially threaten a decline in tribal authority. Different cultural views of parental responsibility are likely to be reflected by the ultimate custody determinations of tribal and state courts. To assume jurisdiction based solely on the location of the child or his parents or of various activities is to ignore the importance of ethnic heritage and customs. Presumably the tribal court is better equipped to consider the ethnic identity as a factor in determining the child's welfare than is a state court. . .
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> * * *
>
> We conclude that to properly consider tribal interests in child custody that go beyond reservation boundaries, the best means to arrive at a considered decision as to whether a state court should accept or decline jurisdiction is to balance the state interests

> in taking jurisdiction against the tribal interest in assuming jurisdiction. The state may assert jurisdiction in an Indian child custody dispute of this sort if, upon balance, it appears that the state's contacts with and interest in the child and the parties are more substantial than those of the tribe.
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>
> . . . . the trial court must inquire into the contacts of the child, and the parties to the state and to the tribe. It should consider the tribe's interest in deciding the custody of one of its members and must record such inquiries of fact and make appropriate conclusions of law directed at the question of which forum is better suited to determine the child's welfare.

Although *Bertelsen* did not involve application of the UCCJA, it does articulate the kind of inquiry a court should make under the Act.

This is exactly the kind of inquiry the Boulder County District Court should have made either under the UCCJA or as a matter of comity. However, the Colorado court apparently believed that the Blackfeet Tribe had transferred its jurisdiction to State Court. Because the Blackfeet Tribal Court has regularly exercised child custody jusisdiction at least since 1974, this court should grant certiorari and remand to the Colorado courts for application of the correct tribal law.[3]

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[3] Ordinarily, interpretation of tribal laws is a matter which should be undertaken in the first instance by the tribal court. *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971 (1987). Thus, at a minimum, the Colorado court ought to allow the Tribal Court to determine whether it has jurisdiction, and if so, to then confer with the Tribal Court to determine the more appropriate forum based on factors such as those articulated in *Application of Bertelsen, supra,* and in the UCCJA itself.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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September 1988

No. 88 - 220

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

CHERYL ANN VIELLE,

Petitioner,

v.

WILLIAM JOSEPH BAISLEY,

Respondent.

OBJECTION TO FILING OF BRIEF AMICUS CURIAE BY BLACKFEET TRIBE

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October, 1988

OBJECTION TO FILING OF BRIEF AMICUS CURIAE BY BLACKFEET TRIBE

The Respondent, William Joseph Baisley, through his counsel, Nancy S. Terrill, hereby states the following objection to the filing of the Brief Amicus Curiae by the Blackfeet Tribe pursuant to Supreme Court Rule 36.3:

1. On September 23, 1988, the Blackfeet Tribe filed a Motion for Leave to File Brief Amicus Curiae in this case.
2. Respondent had withheld consent to such filing because the Tribe had notified him, through counsel, that it intended to raise issues not raised in the trial court or Colorado Court of Appeals.
3. By failing to appear earlier in the lengthy proceedings involving

this case, the Tribe failed to establish a record upon which to base the arguments contained in its Brief and thus such are not properly before this Court.

WHEREFORE, the Respondent respectfully requests this Court to deny the Motion of the Blackfeet Tribe.

DATED this 14th day of October, 1988.

Respectfully submitted,

EDWARDS, TERRILL & PIZZI

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